IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION.

CRIMINAL APPLICATION No. 264 of 2007

M/s. Frenco Indian Pharmaceuticals
Private Limited. ..Applicant.

Vs.

1.The State of Maharashtra
and (2) Ors. ..Respondents.

Mr Nimish Desai, Advocate for the Applicant.

Mr U. V. Nikam, A.P.P. for the Respondent No.1.

None for the Respndent Nos. 2 and 3.

WITH

CRIMINAL REVISION APPLICATION No. 58 of 2007

M/s. Frenco Indian Pharmaceuticals
Private Limited. ..Applicant.

Vs.

1.The State of Maharashtra
and (2) Ors. ..Respondents.

Mr Nimish Desai, Advocate for the Applicant.

Mr U. V. Nikam, A.P.P. for the Respondent No.1.

None for the Respondent Nos. 2 and 3.

CORAM: V. C. DAGA,J.
DATED: 19TH SEPTEMBER, 2007.

ORDER:-

1. The Criminal Revision Application No. 264 of 2007 is directed against the judgment and order dated 15.12.2006 passed in Criminal Appeal No. 648 of 2005 by the learned Additional Sessions Judge, Greater Mumbai;(in short "the first Appellate Court") whereby,

the appeal filed by the appellant accused Nos. 1 and 2 (i.e. the respondent Nos. 2 and 3 herein) came to be allowed and the criminal complaint dated 14th October, 2005, C.C. No. 1684/SS/05, came to be dismissed; whereunder, the accused nos. 1 and 2 were convicted by judgment and order dated 14.2.2005 passed by learned Special Metropolitan of Small Causes Court, Mumbai ("the Trial Court" for short) for the offence punishable under Section 138 read with Section 141 of the Negotiable Instruments Act.

FACTUAL MATRIX:-
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2. Factual matrix lies in narrow compass:-

The petitioner "M/s Frenco Indian Pharmaceuticals Private Limited" had filed a complaint under Section 138 read with Section 141 of the Negotiable Instruments Act against the Respondent Nos. 2 and 3 contending that they had appointed respondent no.1 as authorized distributor and during the period May, 2000 to November, 2002, they had supplied goods to them. There were outstanding dues payable by the respondent no.1- Company to the tune of Rs.20.35,188/-. The respondent no.2 issued a cheque bearing No.877003 dated

1.9.2003 for Rs. 8,00,000,/- drawn on "Indus Ind Bank", Andheri (East), Mumbai and handed over to the complainant/petitioner.

3. The aforesaid cheque was deposited by the applicant-petitioner with its Bankers which came to be dishonoured with bankers endorsement "funds insufficient".

4. The petitioner-complainant, thereafter, issued demand notice dated 24.9.2003, which was received by the respondent no. 1 and 2 but they failed to make payment of the "dishonoured cheque" which resulted in initiation of criminal proceeding under Section 138 read with Section 141 of the Negotiable Instruments Act ("the N.I.Act" for short).

5. The defence of the respondent Nos. 1 and 2 was that the respondent no. 2 had issued cheque in his personal capacity; that too, under duress and force. In other words, it was not issued voluntarily. That he did not owe anything to the petitioner - complainant. The said cheque was issued by him from his personal account. That there was no legally enforceable liability against him.

Consequently, the cheque was never issued in discharge of any legal liability. The complainant was requested in writing not to put cheque for encashment since it was not issued voluntarily and not in discharge of legally enforceable liability. This defence did not find favour with the Trial Court. With the result, the Trial Court convicted the Respondent No. 1 and 2.

6. The appeal was carried to the Additional Sessions Judge, Greater Mumbai against the above order of conviction, who was pleased to accept the contentions of the Respondent Nos. 1 and 2 and went on to record finding of fact that the Respondent No.2 had not issued cheque voluntarily. That the Respondent no. 2 had issued prior written notice to the complainant not to present the cheque for encashment. Inspite of this, the complainant chose to present the cheque for encashment.

7. The lower Appellate Court also recorded a finding of fact that the letter issued by the respondent no.2 was factually received by the petitioner-complainant. As such, the complaint under Section 138 of the N.I.Act was not maintainable. The lower Appellate Court

also recorded a categorical finding that there was no legally enforceable liability as against the respondent No.2. The cheque was given by the respondent No.2 from his personal account and not from the account of the Company that too under pressure. As such, the complaint was not maintainable. Conviction came to be set aside. This order is subject matter of challenge in the present revision petition.

SUBMISSIONS:

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8. The learned counsel appearing for the applicant tried to contend that the lower appellate Court did not appreciate evidence properly and the same was considered in the mechanical manner. As such, the impugned judgment and order is unsustainable. He also placed reliance on the judgment of the Apex Court in the case of **C.D.S. Ltd. Vs. Beemna Shabeer and Anr, A.I.R. 2002, S.C., 3014** to contend that the cheque shall be deemed to have been issued by the respondent no.2 as a guarantor. As such, it ought to have been treated as having been issued in discharge of legally enforceable debt or liability.

CONSIDERATION:-

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9. Having heard the learned counsel for the applicant, the contention raised has no force for the simple reason that at no point of time the respondent No.2 issued this cheque as a guarantor of the company. Apart from this, the finding of fact is recorded by the Court below that cheque in question was not issued voluntarily but it was taken forcibly.

10. In the above view of the matter, the finding of fact recorded by the lower Appellate Court based on proper appreciation of evidence cannot be disturbed. The same are not perverse. No fault in that behalf can be found.

11. In the aforesaid settled legal position and taking over all view of the matter, there is no merit in the revision petition. The same is liable to be dismissed.

12. In the result, the revision petition is dismissed, with no order as to costs.

CRIMINAL REVISION APPLICATION No. 58 of 2007.

13. The applicant has also filed one another Criminal Revision Application No. 58 of 2007 to challenge the order dated 15.12.2006 passed in Criminal Revision Application No. 1968 of 2005 preferred by the petitioner before the Additional Sessions Judge, Greater Mumbai, which came to be dismissed, in which the petitioner was seeking enhancement of the sentence imposed by the Special Metropolitan Magistrate, Small Causes Court, Mumbai together with enhancement of amount of compensation awarded to the complainant. The First Revisional Court dismissed the revision filed by the complainant since the appeal filed by the accused was allowed. Against this order the present revision is preferred.

14. The revision is liable to be dismissed on two counts viz: -

Firstly, the second revision at the instance of the very same applicant is not maintainable. Secondly, the appeal itself filed by the accused having been allowed and one revision petition having been preferred

to challenge that order,which is dismissed today, another Criminal Revision Petition against the very same order cannot be entertained.

15. In the aforesaid view of the matter, without going into the merits or demerits of the impugned order, second revision challenging the very same order at the instance of the present applicant is not maintainable. The revision petition is, thus, liable to be dismissed as not maintainable. In the result,the same is dismissed with no order as to costs.

(V.C. DAGA,J)